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IN THE

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF FREE SPEECH DEFENSE AND EDUCATION FUND, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, AMERICAN TARGET ADVERTISING, INC., EBERLE COMMUNICATIONS GROUP, INC., GUN OWNERS FOUNDATION, ENGLISH FIRST, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AND CITIZENS UNITED FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici curiae, Free Speech Defense and Education Fund, Inc., Conservative Legal Defense and Education Fund, American Target Advertising, Inc., Eberle Communications Group, Inc., Gun Owners Foundation, English First, Lincoln Institute for Research and Education, and Citizens United Foundation, share a common interest in the proper construction of the Constitution and laws of the United States.[1]

Six of the *amici* are nonprofit organizations, five of which are tax-exempt under IRC Section 501(c)(3) — Free Speech Defense and Education Fund, Inc., Conservative Legal Defense and Education Fund, Gun Owners Foundation, Lincoln Institute for Research and Education, and Citizens United Foundation — and one of which is tax-exempt under IRC Section 501(c)(4) — English First. Each was established for purposes related to participation in the public policy process. They also communicate, or have communicated in the past, including the solicitation of funds, through a variety of means with the public. The other two *amici* — American Target Advertising, Inc. and Eberle Communications Group, Inc. — are for-profit companies which, *inter alia*, assist nonprofit organizations in developing and implementing direct marketing programs to the public.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. *See* Supreme Court Rule 37.3(a).

The *amici* believe that their perspectives on the issues in this case will be of assistance to the Court in deciding the pending matter. It is intended that this *amicus curiae* brief will bring to the attention of the Court relevant matter not already brought to the Court's attention by the parties, including the perspective of these nonprofit and for-profit organizations on the legal issues presented by the parties. In the past, each of the nonprofit *amici* has conducted research involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.

The case now before this Court concerns the authority of government, purportedly acting in the public interest, to dictate or otherwise restrict the content of communications to the public from nonprofit organizations involving soliciting financial contributions through professional marketers and fundraisers. These *amici curiae*, whose own activities concern communications to the public that involve soliciting financial contributions, believe that the Attorney General's position herein presents a substantial threat of government encroachment on long-established First Amendment rights, and believe that this brief on the important constitutional principles at stake will be of interest and use to this Court.

STATEMENT OF THE CASE

This case comes to this Court on a writ of certiorari to the Supreme Court of Illinois. At issue is whether the state supreme court properly affirmed the dismissal of a thrice-amended civil complaint filed by the petitioner, state's Attorney General, James E. Ryan ("Attorney General"), against the respondents, Telemarketing Associates, Inc. and Armet, Inc., together with their director-owner, Richard Troia ("Telemarketers"), for having failed to state a cause of action

because the purported cause of action for "fraud" violated the First and Fourteenth Amendment guarantees afforded charitable solicitations.

In affirming the granting of Telemarketers' motion to dismiss, the Illinois Supreme Court accepted, as true, "all well-pled facts" in the Attorney General's third amended complaint. People *ex rel.* Ryan v. Telemarketing Associates, Inc. *et al.*, 763 N.E.2d 289, 291 (Ill. 2001) (hereinafter Ryan v. Telemarketing). Accordingly, the court found that the corporate Telemarketers had negotiated a contract with VietNow National Headquarters ("VietNow") to, among other services, solicit funds on VietNow's behalf, and that, pursuant to the terms of that contract, Telemarketing Associates, Inc., "retained 85% of the gross collections in the State as its total compensation for all efforts and costs associated with the Marketing Program." *Id.*, 763 N.E.2d at 291.

The court further found that according to the contracts attached by the Attorney General to the complaint and thereby made a part of the pleadings, the Marketing Program was not just limited to raising funds, but included "producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine which would 'increase community awareness of [VietNow].'" *Id.*, 763 N.E.2d at 297. Additionally, the program obligated Telemarketer Armet to produce a quarterly publication, "[a]t least 30% [of which] was to be devoted to editorial content provided by VietNow," as part of an "advertising and public awareness campaign." *Id.*, 763 N.E.2d at 298. In light of the fact that the Marketing Program was paid for by the funds solicited by Telemarketers, the state court found that "[t]he fund-raising services ... provided ... were inextricably intertwined with the advancement of VietNow's philosophy and purpose." *Id.*, 763 N.E.2d at 298.

Thus, Telemarketers served as VietNow's agent to promote the organization, educate the public, prepare, and distribute publications, all of which are paid for out of solicited funds, VietNow benefitted not only by receiving 15 percent of the gross proceeds, but also by receiving a valuable house list of supporters as well as the additional services performed on behalf of VietNow's tax-exempt mission.

The court found that there was nothing in the complaint "suggest[ing] that [Telemarketers] have not fully complied with the terms of their contracts," and also found that VietNow had never "expressed dissatisfaction with the fund-raising services provided by [them]," having received from Telemarketers' solicitation efforts on its behalf "an amount just under 15% of the gross receipts." *Id.*, 763 N.E. 2d at 291. At the same time, the court accepted as true "that retention of 85% of donated funds goes well beyond any reasonable expectation of the public," as alleged by the Attorney General in "the affidavits of 44 VietNow donors who assert that they would not have given money to the charity had they known how little of their donation was directed to the intended cause." *Id.*, 763 N.E.2d at 293.

On the strength of the donor affidavits, the Attorney General contended that "the complaint is legally sufficient because it sets forth all of the elements necessary to state a valid cause of action for common law fraud." *Id.*, 763 N.E.2d at 293. The state supreme court disagreed, dismissing the third amended complaint on the ground that it did not contain a sustainable charge of common law fraud. *Id.*, 763 N.E.2d at 299. According to the opinion below, the "offenses" contained in the Attorney General's third amended complaint "were premised on the fact that [Telemarketers] retained 85% of charitable funds collected on behalf of VietNow, and, when soliciting, failed to inform donors that only 15% of their

contribution would be distributed to charity." *Id.*, 763 N.E.2d at 291-292.

Indeed, beginning with the initial complaint the Attorney General had coupled a common law fraud charge with a claim that Telemarketers had "breach[ed] ... their duty as fiduciaries of charitable assets." Both charges were made "because the fees charged by [Telemarketers] for conducting the solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets,' and because [Telemarketers] did not advise donors that only 15% of the funds raised would be turned over to VietNow." *Id.*, 763 N.E.2d at 291-292. Even though the Attorney General included, in his second amended complaint, an additional charge that Telemarketers had secured donations to VietNow by "obtain[ing] money from donors under false pretenses," the state supreme court found that the Attorney General's factual premise for this charge remained unchanged: Telemarketers had "fail[ed] to reveal to donors the percentage of the contribution which would actually go to the charity." *Id.*, 763 N.E.2d at 292. This claim, in turn, was based upon an alleged "violation of Section 15(b)(5) of the Solicitation for Charity Act ... which requires professional fund-raisers to identify 'fully and accurately' the purpose for which funds are solicited." *Id.*, 763 N.E.2d at 292.

Additionally, by not seeking an individualized common law damage remedy tailored to a traditional fraud claim, or a similarly individualized criminal remedy of fine or incarceration proportionate to a traditional false pretenses claim, the state supreme court found that the Attorney General's complaint did not constitute "an instance of individual litigation." *Id.*, 763 N.E.2d 297. Rather, the court below found that the complaint "seeks to enjoin [Telemarketers] from conducting any future fund-raising activities based on allegations that [Telemarketers], when

soliciting on behalf of VietNow, committed 'fraud' because ... [Telemarketers] retained 85% of the gross receipts and failed to disclose this information to donors." *Id.*, 763 N.E.2d at 297. Thus, the state supreme court rejected the Attorney General's contention that "the problem of fraud is being attacked, not through the application of 'broad prophylactic' ordinances or statutes affecting all fund raisers..., but through enforcement of the state's antifraud laws against specific defendants for 'specific instances of deliberate deception.'" *Id.*, 763 N.E.2d at 296. Accordingly, the court concluded that "the Attorney General's complaint is, in essence an attempt to regulate [Telemarketers'] ability to engage in [charitable solicitation] based upon a percentage-rate limitation." *Id.*, 763 N.E.2d at 297.

Having found that the complaint "incorrectly presumes that there is a nexus between high solicitation costs and fraud," the state supreme court ruled that the complaint was "indistinguishable from the regulatory programs struck down in" Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). Ryan v. Telemarketing Associates, 763 N.E.2d at 299.

SUMMARY OF ARGUMENT

Petitioner, the Illinois Attorney General, has argued that nondisclosure at the point of solicitation by Respondents, Telemarketing Associates, *et al.* ("Telemarketers") — of the division of proceeds donated to the charitable organization (VietNow) represented by Telemarketers — constituted fraud, but he is in error, both factually and legally. As authoritatively determined by the Supreme Court of Illinois, the Illinois Attorney General's attempt — under the guise of a fraud claim

— to sue Telemarketers for the nondisclosure of the division of proceeds was in reality an effort to regulate professional charitable solicitation contracts, an impermissible goal under this Court's rulings in Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). The holding of the Supreme Court of Illinois was correct, and the Attorney General should not be able to circumvent, by litigation, this Court's proscription against unconstitutional legislation.

This is a charitable solicitations case, which is governed by the rules authoritatively laid down by this Court in a number of prior cases, including Schaumburg, Munson, and Riley. By mischaracterizing the nature of the speech in issue as akin to commercial speech or defamation, the Illinois Attorney General has relied upon a false jurisdictional premise in his effort to undo this Court's prior rulings rejecting governmental attempts to regulate free speech.

The government's claim of plenary regulatory power over allegedly false or misleading ideas in the marketplace of ideas is also constitutionally illegitimate, as consistently ruled by this Court in cases dating back many decades. Charitable solicitations belong in the First Amendment marketplace of ideas, not in the commercial marketplace of goods and services, and the federal *amici* supporting the Attorney General are mistaken in their attempt to justify the complaint as having complied with this Court's First Amendment rulings governing commercial speech.

Although the State of Illinois has a legitimate interest in prohibiting fraud, that interest is not served by the bootstrapping efforts of the Attorney General in this case in a

blatant attempt to regulate charitable solicitations under the pretense of an action for fraud coupled with a claim that funds raised by charitable solicitations are held in trust for the State. The Illinois Attorney General's actions, if allowed, abridge the freedoms of speech and the press by taking unconstitutional editorial control over the way that solicitations are made and by imposing an unconstitutional prior restraint on First Amendment activities.

Finally, the Illinois Attorney General's generalized claim that moneys raised by charitable solicitations are held in trust for the benefit of the State unconstitutionally abridges the First Amendment right of association. That right empowers each individual to decide what to say and how to say it, and what to hear and how to respond to it. Under the guise of a cleverly conceived — but fundamentally flawed — fraud claim, the Attorney General has attempted to unconstitutionally interpose the power of the State, thereby depriving VietNow and its supporters of their associational rights.

ARGUMENT

I. THE ATTORNEY GENERAL'S COMPLAINT, AS AUTHORITATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT, IS DESIGNED TO IMPOSE A CONSTITUTIONALLY IMPERMISSIBLE PERCENTAGE-BASED LIMITATION ON THE CONTRACT TERMS OF PROFESSIONAL FUNDRAISERS AND THEIR CHARITABLE CLIENTS.

In his brief, the Attorney General has characterized the complaint at issue in this case as one "alleging common law fraud as well as violations of several state anti-fraud statutes." Pet. Br. 2. Similarly, in their *amici curiae* brief, the United States and the Federal Trade Commission ("Federal *amici*") have asserted that the essence of the Attorney General's complaint is one alleging fraud. *US/FTC Amici* Br. 6-7. Both views are at odds with the Illinois Supreme Court's view of the complaint. Neither the Attorney General nor the Federal *amici*, however, has given any good reason for this Court to reject the state supreme court's characterization of the complaint.

In Reitman v. Mulkey, 387 U.S. 369 (1967), this Court faced a situation similar to the one presented here. At issue in Reitman was whether a state constitutional amendment was forbidden by the equal protection clause of the 14th Amendment because it constituted the state's "encouragement" of private racial discrimination. *Id.*, 387 U.S. at 370. This Court noted after a careful review of the history of the amendment, and against the backdrop of this Court's "state action" decisions in relation to the equal protection clause — that the California Supreme Court had determined — as a matter of state constitutional policy, that the amendment established a "constitutional right to *privately* discriminate," not just a repeal of existing laws prohibiting such discrimination. *Id.*, 387 U.S. at 370-71, 373-77. In striking down this prohibited state action, this Court accepted the California court's characterization of the amendment as "intended to authorize ... racial discrimination in the housing market," and thus, "the right to discriminate is now one of the basic policies of the State." *Id.*, 387 U.S. at 381.

In this case, the Illinois Supreme Court construed the Attorney General's complaint as one seeking "to enjoin defendants from conducting any future fund-raising activities based on allegations that ... the statements made by defendants during solicitation are ... 'false' **only** because defendants retained 85% of the gross receipts and failed to disclose this information to donors." Ryan v. Telemarketing, *supra*, 763

N.E.2d at 297 (emphasis added). As such, the Illinois Supreme Court concluded that "the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity [i.e., charitable solicitation] based upon a percentage-rate limitation." *Id.*, 763 N.E.2d at 297. It is this construction, placed upon the complaint by the highest court in the state, that is being challenged by the Attorney General. That challenge should be rejected. The Illinois Supreme Court's reading of the complaint should be accepted by this Court as an authoritative construction of state law. *See* Reitman v. Mulkey, *supra*, 387 U.S. at 373-74.

The Attorney General's complaint was never limited to a simple charge of fraud, as the Attorney General and the Federal *amici* would have this Court believe. *See* Pet. Br. 2; US/FTC Br. 3. Rather, from the beginning, the Attorney General laid alongside the fraud charge another claim — that Telemarketers "breach[ed] their duty as fiduciaries of charitable assets," supported by the allegation that "the fees charged by defendants for conducting solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets'" — in order to sustain the state's fraud claim based upon "defendants' [failure to] advise donors that only 15% of the funds raised would be turned over to VietNow." Ryan v. Telemarketing, *supra*, 763 N.E.2d at 291-292. Even when the Attorney General added, in his second amended complaint, the false pretenses charge, that charge was coupled with a further amendment claiming that "defendants' solicitations were in violation of section 15(b)(5) of the Solicitation for Charity Act ... which requires professional fund-raisers to identify 'fully and accurately' the purpose for which funds are solicited." *Id.*, 763 N.E.2d at 292.

Not only do the substantive claims of the Attorney General's complaints belie his contention before this Court that this is a simple case of fraud, his remedial claims do so as well.

If this truly were an "instance of individual litigation," as the Attorney General has claimed, then it would have been a straight-up civil fraud claim seeking a money damage award on behalf of allegedly defrauded donors, or a single complaint seeking a penalty authorized by the state's general fraud statute. Instead, the Attorney General sought "forfeiture of [Telemarketers'] collected fees," a "surcharge [on the] defendants for assets found to have been misspent or misused," and "an injunction prohibiting defendants from conducting any future fund-raising services," all of which remedies and penalties were, as the Illinois Supreme Court found, "authorized by section 9 of the Solicitation for Charity Act," not by a common law or statutory fraud action or a false pretenses criminal charge. *Id.*, 763 N.E.2d at 292.

In short, the Attorney General's claim before this Court that he was simply pursuing "the enforcement of the state's antifraud laws against specific defendants for 'specific instances of deliberate deception,'" not "through the application of 'broad prophylactic' ordinances or statutes affecting all fund-raisers," was rightly rejected by the Illinois Supreme Court:

> Finally, we note that, although the Attorney General's complaint is aimed at regulating the fund-raising efforts of the defendants, this case has far-reaching implications for all fund-raisers. If a complaint such as the one at issue in this case is allowed to proceed, all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public is being deceived about the charitable nature of a fund-raising campaign because the fund-raisers' fee was too high. [*Id.*, 763 N.E.2d at 296, 299.]

Having rightfully rejected the Attorney General's claim that he was simply "combating fund-raising fraud [by means of] "individual litigation," not enforcing a "broad regulatory statute" (*id.*, 763 N.E.2d at 297), the Illinois Supreme Court also correctly found that the Attorney General was wrongfully attempting to accomplish by litigation what had been attempted by the legislation found unconstitutional in Schaumburg, Munson, and Riley:

> [W]e conclude that the Attorney General's complaint suffers from the same 'fundamental flaw' described by the Supreme Court in *Schaumburg, Munson* and *Riley*. The complaint incorrectly presumes that there is a nexus between high solicitation costs and fraud and attempts to regulate defendants' constitutionally protected solicitations on that basis. Contrary to the Attorney General's contentions, the complaint is not a 'less intrusive' means of regulation, but is, instead indistinguishable from the regulatory measures struck down in *Schaumburg, Munson* and *Riley*. [*Id.*, 763 N.E.2d at 299.]

There is no sound reason for this Court to reject the Illinois Supreme Court's judgment that the Attorney General's complaint in this case has far-reaching implications for all fundraisers in that the complaint was designed to impose "a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a [First Amendment] protected activity," as established by this Court in the Schaumburg, Munson, and Riley trilogy. *See id.* After all, it is the Illinois Supreme Court, not this Court, that has knowledge of the facts and circumstances concerning the complaint, its potential impact and the milieu in which the complaint would operate. *See, e.g.*, People *ex rel.* Ryan v. The World Church of Creation, 760 N.E.2d 953, 961 (Ill. 2001) ("The courts of this State are

in accord in applying a broad legal definition of 'charity' to include almost anything that tends to promote the improvement, well-doing and well-being of social man.") (Citation omitted.)

Accepting the Illinois Supreme Court's judgment would, therefore, be consistent with the disposition of the equal protection claim in Reitman v. Mulkey, *supra,* where this Court found "no sound reason for rejecting [the California Supreme Court's] judgment" that the constitutional amendment in that case reflected a constitutionally impermissible state regulatory scheme sanctioning private racial discrimination in the housing market, because "the California court [was] armed ... with the knowledge of the facts and circumstances concerning the passage and potential impact [of the constitutional amendment], and [was] familiar with the milieu in which the provision would operate." *Id.*, 387 U.S. at 376-378.

II. THE COMPLAINT, AS AUTHORITATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT, RESTS UPON A CONSTITUTIONALLY IMPERMISSIBLE PREMISE WHICH HAS BEEN CONSISTENTLY REJECTED BY THIS COURT.

Relying upon selected excerpts from Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), the Attorney General has attempted to justify his entire case on the ground that "fraudulent charitable solicitations are not protected speech under the First Amendment," claiming that such solicitations are the equivalent of "false statements of fact [that] 'are no essential part of any exposition of ideas.'" Pet. Br. 13. In reliance upon Schneider v. State, 308 U.S. 147, 164 (1939), the Federal *amici* have made a comparable claim, asserting that "fraudulent

charitable solicitations," because they are "fraudulent speech," are "unprotected," being outside "the marketplace of ideas" preserved by the First Amendment. US/FTC *Amici* Br. 6-7. Neither of the cases cited by the Attorney General, nor the one cited by the Federal *amici,* nor the relevant text of the applicable First Amendment guarantees, supports the jurisdictional premise upon which the Attorney General has rested his complaint.

A. Jurisdiction over the Making of False Statements of Fact in the Marketplace of Ideas Protected by the First Amendment Must Rest upon a Sustainable Basis Other than Regulating Protected Speech.

In Schaumburg, Munson, and Riley, this Court has squarely held that charitable solicitations belong in the First Amendment's protected marketplace of ideas, because such solicitations are so intertwined with protected speech that they cannot be separated.[3] Schaumburg, *supra,* 444 U.S. at 628-32;

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[3] The marketplace of ideas is a veritable field of competition for contributions among charities, issue advocacy groups, educational organizations, political action committees, and candidates for public office. These *amici* include both tax-exempt entities and for-profit consultants that rely on marketing programs similar in many ways to the arrangement between VietNow and Telemarketers. Such robust competition as exists among such charitable organizations, dependent upon the public for support, is easily thwarted by states' attorneys general and other government officials. Larger charities often have lower fundraising costs because they solicit and accept government funds and bequests from the wealthy. These larger charities can encourage their allies in government to pursue regulatory policies which seek to keep out upstart competition. Many of these "upstarts" seek to communicate with many people of lesser financial means who might otherwise never hear certain positions on public policy, social, moral, and religious issues, but for appeals to them for relatively small contributions. Such "grassroot" outreaches are particularly important in today's society wherein many feel "left out" by other nonprofits which focus on potential high dollar donors who can be solicited with lower costs than mass-based groups. Accordingly, this Court has extended full First Amendment protection to mass-based communications by telemarketing and direct mail in recognition of the important role that such efforts, however high the fundraising costs are to attract small donors, play in making the freedoms of speech, press, association, and petition a reality in every American's life. *See* Schaumburg, *supra*, 444 U.S. at 635. The costs of skillfully targeting educating and motivating citizens to promote the VietNow message may be greater than, for example, those of wealthier and more established charities, such as the American Red Cross or the American Cancer Society, but the marketplace of ideas should not just be available to the established and well-heeled. Without the services of professional telemarketers equipped with the necessary expertise and equipment, such as the one in this case, many small, new, and unpopular nonprofits could not even enter the marketplace due to the costs of personnel, capital equipment, and access to lists of potential new donors.

Munson, *supra,* 467 U. S. at 959-64; Riley, *supra,* 487 U.S. at 787-88. In so ruling, this Court has rejected the Attorney General's tactical ploy in his complaint to proceed only against the commercial firm so as to isolate Telemarketers from their nonprofit principal, VietNow, in an effort to invert their principal/agent relationship so that it appears that VietNow serves Telemarketers' financial interest, rather than Telemarketers serving VietNow's communicative interests as the state supreme court found. *Compare* Pet. Br. 9 ("Deception for profit is not protected speech under the First Amendment") *with* Ryan v. Telemarketing, *supra,* 763 N.E.2d at 298 ("[F]raud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity.").

According to the Attorney General's theory of the case, however, Telemarketers had an affirmative duty to tell the donors, at the point of solicitation, the percentage of funds that would go to VietNow under its contract with Telemarketers.

Otherwise, the Attorney General maintains, potential donors would be misled. As demonstrated by the court below, however, the Attorney General's assertion is simply wrong. *See id.*, at 298. The percentage of funds turned over to the charity is **not** an accurate measure of the amount of the proceeds used "for" a charitable purpose, and this Court (*e.g.*, Munson 467 U.S. at 967 n. 16) has so stated. Ryan v. Telemarketing, *supra,* 763 N.E.2d at 298. The services provided by Telemarketers' Marketing Program included the development of substantive materials advancing VietNow's mission, and the fund-rasing services "were inextricably intertwined with the advancement of VietNow's philosophy and purpose." *Id.* Thus, the Attorney General's very premise, upon which he attempted to justify the State's control over Telemarketers' communications, was fatally deficient.[4]

Furthermore, it is not constitutionally legitimate for the government to step in to correct even a "misleading" communication in the First Amendment's free marketplace of ideas. Indeed, in Cantwell v. Connecticut, 310 U.S. 296 (1940), a unanimous Supreme Court observed:

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[4] As a politician seeking the office of Governor of Illinois in 2002; Attorney General Ryan, not surprisingly, funded his campaign principally through large donations. His official candidate committee, Citizens for Jim Ryan, during one six month period,, raised $3,266,835 in individual and corporate contributions, with an *approximate average itemized (over $50.00) contribution of $1,365* (based on a sample using the first 248 contribution on that report) in that six-month period, while raising only $96,867 in nonitemized contribuitons. No doubt General Ryan had a higher fund raising cost for the small contributions he received, but they nonetheless were inextricably intertwined with his effort to obtain personal commitments of support from many voters. Citizens for Jim Ryan D-2 Semi-Annual Report, 1/1/2002 thru 6/30/2003, http://www.elections.state.il.us/CDS/pages/D2Semi.asp?FiledDocID=234538&ID=1453&Re.

> [I]n the realm of religious faith, and in that of political belief [it is commonplace] [t]o persuade others [by] resorts to exaggeration, to vilification ... **and even to false statement**... But the people of this nation have ordained in light of history, that, in spite of the probability of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. [*Id.*, 310 U.S. at 310 (emphasis added).]

Thirty-four years later, in the same vein, this Court observed that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is inevitable in free debate ... [a]nd punishment of error runs the risk of inducing cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Accordingly, this Court has proclaimed that, in the marketplace of ideas protected by the First Amendment, "there is no such thing as a false idea, [and] [h]owever pernicious an opinion may seem, we depend upon its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*, 418 U.S. at 339-340. As Justice Potter Stewart put it:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought — thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker. 'Under the First Amendment

> there is no such thing as a false idea,' and the only way that ideas can be suppressed is through 'the competition of other ideas.' [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 777 (1978)].

In essence, the free marketplace of ideas established by the freedoms of speech, press, assembly, and petition is the self-governing market of the people. Thus, it is not for the government to decide — particularly not here, where no fraudulent statement possibly exists — whether a person has the privilege of speaking to another, and upon what terms, but it is for the people themselves to decide whether to speak, and what to say. and whether to listen, and what to believe. Martin v. City of Struthers, 319 U.S. 141, 144 (1943). It is not for the government to step in, as the people's protector, and determine what information should be included in the communication, in an effort to purify the marketplace. Rather, as Justice Holmes put it in his now-vindicated dissent in Abrams v. United States, 250 U.S. 616, 630 (1919), "the best test for truth is the power of a thought to get itself accepted in the competition of the market," not whether they meet some standard of truthfulness as set by a government official, legislative, executive or judicial. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988).

Under the constitutionally-established regime of First Amendment freedoms, then, the Attorney General **cannot** justify an effort to prohibit "fraudulent statements" by the bald assertion that such statements "are no essential part of any exposition of ideas," and therefore, are "unprotected speech." Pet. Br. 13. Rather, he must first demonstrate that the government has articulated a valid fraud claim. And this, as pointed out by the Illinois Supreme Court, the Attorney General failed to do. Instead, the Attorney General's complaint is

erroneously premised upon the existence of a duty to "reveal to potential donors, at the point of solicitation, the amount of charitable proceeds turned over to a charity," and thus, "[is] a [forbidden] content-based regulation of protected speech which [is] unduly burdensome and not narrowly tailored." *See* Ryan v. Telemarketing, *supra*, 763 N.E.2d at 296, citing Riley. Additionally, the Attorney General's "compelled disclosure requirement is mistakenly rooted in the presumption "that a charity derives no benefit from funds collected but not disbursed to it." Accordingly, the complaint, on its face, does not even contain an allegation that what Telemarketers said was untrue, much less fraudulent. Instead, if the Attorney General is allowed to proceed in this complaint he would create the **false impression** that the "net proceeds returned" to VietNow accurately reflect the amount of funds which go toward VietNow's charitable purposes. *Id.*, 763 N.E.2d at 298.

B. The Standards Governing False Statements with Respect to Commercial Speech Do Not Apply to Statements with Respect to Charitable Solicitations.

Building upon the sentence — "Untruthful speech, commercial or otherwise, has never been protected for its own sake" — extracted from this Court's opinion in Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, *supra,* the Attorney General has attempted to break away from the historic differences between charitable solicitations and commercial speech, in order to justify his aim to impose upon charitable solicitations the same First Amendment standards governing misrepresentations in the sales of goods and services.[5] When it comes to the protections of the speech,

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[5] The Federal *amici* have likewise become enthusiastic supporters of this dangerous tactic, liberally sprinkling their brief with citations to commercial fraud cases, such as Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383

press, and association guarantees of the First Amendment, this Court has never treated charitable solicitations and commercial transactions the same, and for good reason.

In Schneider v. State, 308 U.S. 147 (1939), relied upon by the Federal *amici,* this Court struck down a comprehensive regulatory scheme as it applied to door-to-door solicitation of contributions to a religious cause. *Id.*, 308 U.S. at 157-59, 163-64. In doing so, this Court made clear that its decision was "not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires." *Id.*, 308 U.S. at 165. Thus, in 1951, this Court upheld a prohibition on door-to-door solicitation of magazine subscriptions, emphasizing that the "selling [brings] into the transaction a commercial feature" and distinguishing its prior decision in Martin v. Struthers, *supra,* as a case involving "no element of the commercial." Breard v. Alexandria, 341 U.S. 622, 642-643 (1951).

While Schneider and Breard were decided under this Court's now discarded assumption that commercial speech was wholly unprotected by the First Amendment (*see* Valentine v. Chrestensen, 316 U.S. 52 (1942)), the extension of First Amendment protection to truthful commercial advertising has not removed First Amendment protection for what a government official may perceive to be untruthful noncommercial speech. Rather, as this Court has repeatedly emphasized, the First Amendment protection extended to "commercial speech" is governed by a much lower standard than the noncommercial, as is clearly evidenced by the special four-part test applied to commercial speech. *See, e.g.,*

(1888), and Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948). These cases are inapposite.

Thompson v. Western States Medical Center, 535 U.S. ___, ___, 152 L.Ed.2d 563, 573 (2002).

Since Schaumburg v. Citzens for a Better Environment, *supra,* this Court has consistently refused to apply the commercial speech test to charitable solicitations, thereby reaffirming the principle in Schneider v. State, *supra*, that solicitation of money as part of the promotion of ideas is constitutionally distinct from the solicitation of money pursuant to a commercial transaction. *See* Schaumburg, *supra,* 444 U.S. at 628-32; Riley, *supra,* 487 U.S. at 787-88.

With respect to commercial speech, the threshold constitutional test is whether the speech at issue "concerns unlawful activity or is misleading." If it is, then such speech is "not protected by the First Amendment." Thompson v. Western States Medical Center, *supra*, 535 U.S. at ___, 152 L.Ed.2d at 573. Throughout his brief, the Attorney General has mistakenly applied this threshold test to charitable solicitations. Thus, his Summary of Argument begins as follows:

> The First Amendment does not give a fundraiser the right to solicit charitable donations by fraudulent means, including misrepresentations about how the donated funds will be used. Deception for profit is not protected speech under the First Amendment, and this is as much the case for half-truths and other implied misrepresentations long recognized at common law as it is for blatant lies. That such fraud is perpetrated by someone seeking money in the name of a charity does not make it protected speech. [Pet. Br. 9.]

He then proceeds to undergird his entire argument with the claim: "Fraudulent charitable solicitations are not protected speech under the First Amendment." Pet. Br. 12. Thus, by

relying upon his own allegation that the charitable solicitations at issue are fraudulent, the Attorney General has bootstrapped his claim that the statements made by the charities' for-profit telemarketer are unprotected by the First Amendment.

Such reasoning is specious, and ignores entirely this Court's key pronouncements in Schaumburg, Munson, and Riley. The Attorney General is attempting to avoid those rulings by a litigator's sleight of hand. The lower court did not hold that a fundraiser has the right to solicit contributions by fraudulent means, as the Attorney General suggests. Rather, it held that the State could not justify a fraud claim based upon the non-disclosure in a charitable solicitation of the net contribution proceeds received by the charity. And if it were otherwise — if the State could legitimately saddle a solicitation with a badge of fraud for failure to disclose the division of contribution proceeds — the State clearly would be circumventing the effect of this Court's rulings in the Schaumberg/Munson/Riley trilogy. Thus, the Attorney General's request that this Court "hold that fraudulent charitable solicitations — including ones based on implied misrepresentations — are unprotected speech..." (Pet. Br. 22) masks the real regulatory purpose. While the Attorney General has claimed that all he is asking is that this Court clarify prior rulings, he has really asked it to overrule the Schaumburg, Munson, and Riley holdings and decide that the rule governing charitable solicitations be changed to that governing commercial speech.

Not only has the Attorney General applied the first part of the four-part test governing commercial speech, but a variation of the second part as well, arguing that he need demonstrate only a "substantial interest" in prohibiting "fraudulent" charitable solicitations, including "half-truths and other implied assertions of verifiably false facts" (Pet. Br. 14-24), as if this were a commercial speech case. *See* Thompson v. Western States Med. Ctr., *supra*, ___ U.S. at ___, 152 L.Ed.2d at 574-75. Again, the Attorney General has urged this Court to apply a test to charitable solicitations expressly rejected by this Court in Schaumburg, as restated in Riley, having applied "exacting First Amendment scrutiny" to charitable solicitations, and having rejected the "State's argument that restraints on the relationship between the charity and the fundraiser were mere 'economic regulations' free of First Amendment implications." Riley, *supra*, 487 U.S. at 788-89.

In sum, the Attorney General is asking this Court to overrule nearly 60 years of precedent and find — for the first time in its history — that solicitations of money to support political, religious, and other like causes are no different from advertisements for the sale of pots and pans. This Court should decline this invitation, not only for the reasons stated in Schaumburg, and restated in Riley, but because of the bed-rock principle that the government has no jurisdiction over communications in the free marketplace of ideas to police it for so-called "fraudulent speech."

III. EVEN AS IT IS CHARACTERIZED BY THE ATTORNEY GENERAL, THE COMPLAINT ASSERTS UNCONSTITUTIONALLY IMPERMISSIBLE JURISDICTION OVER THE FREEDOMS OF SPEECH, PRESS, AND ASSOCIATION.

At the heart of the Attorney General's complaint is the claim that, in its regulation of charitable solicitations, the State of Illinois has jurisdiction over "not just blatant falsehoods," or "explicit falsehoods," but over "other forms of deception for pecuniary gain," including "misleading" statements and "implied misrepresentations, such as deceptive half-truths." Pet. Br. 10. In order to sustain his claims that the statements

alleged to have been made by Telemarketers were "misleading" or "deceptive half-truths," however, the Attorney General's complaint relied upon what Telemarketers did **not** say: (1) "they did not state that they were for-profit fundraisers" and (2) "they did not tell donors, that VietNow would receive at most 15 percent of the contributions raised in its name." Pet. Br. 4-5.

In order to sustain the fraud claim contained in his complaint, then, the Attorney General must establish that Telemarketers had a legal duty to disclose (1) that they were "for-profit fundraisers" and (2) "that VietNow would receive at most 15 percent of the contributions." To establish the existence of such a duty, the Attorney General alleged in his complaint that, "by taking possession of assets contributed for specific charitable purposes," Telemarketers became "trustees of those assets for the benefit of the people of Illinois, and they breached their fiduciary duty of loyalty to the people by engaging in self-dealing and devoting those assets to private purposes materially different from the specific charitable purposes for which they were donated." Pet. Br. 6. Thus, the Attorney General claimed that he was entitled to "an accounting, injunctive relief, forfeiture of compensation and the imposition of a constructive trust on the monies ... received for charitable purposes." *Id.*

Because the Attorney General's complaint contains a jurisdictional claim that threatens "activity [that] is constitutionally protected" by the First Amendment, there is a "special obligation on this Court to examine critically the basis upon which liability [is to be] imposed." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982). Upon close examination, the Attorney General's paternalistic trust theory violates the freedoms of speech, press, and association.

A. The Complaint Rests upon a Claim of State Power that Violates the Freedoms of Speech and of the Press.

In Riley v. National Federation of the Blind, *supra,* this Court rejected "the paternalistic premise that charities' speech must be regulated for their own benefit," observing that "[t]he First Amendment mandates that we presume that speakers, not the government know best both what they want to say and how to say it." *Id.*, 487 U.S. at 790-91. In this case, the Attorney General has asserted that charities' speech must be regulated for the benefit of "people of Illinois," but that claim, like the one asserted in Riley, is no more availing. Indeed, such a claim was anticipated in Riley and resoundingly rejected:

> "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities. [*Id.* at 791.]

Additionally, the Attorney General's claim — that a for-profit fundraiser, when speaking on behalf of a charity, is compelled by a constructive trust, fictitiously creating a fiduciary responsibility to the people of Illinois to disclose the percentage of the money solicited that actually goes to the charity — was also anticipated in Riley and rejected:

> [T]he First Amendment guarantees "freedom of speech," a term necessarily comprising the decision both what to say and what *not* to say, [whether that decision] involve[s] compelled statements of opinion [or] with compelled statements of "fact": either form of compulsion burdens protected speech. [*Id.*, 487 U.S. at 796-98 (emphasis original).]

These rulings in Riley affirm the jurisdictional barrier imposed by the freedom of speech guarantee against the Attorney General's claim of plenary power over charitable solicitations because such solicitations are "inextricably intertwined ... with informative and persuasive speech," as the Illinois Supreme Court emphasized:

> The [Telemarketing] contracts with VietNow required [Telemarketers] to produce publications that "increased community awareness" about VietNow. [Telemarketers] were also directed to conduct their solicitations in a manner that would "promote goodwill" on behalf of VietNow. The fund-raising services [Telemarketers] provided, therefore, were inextricably intertwined with the advancement of VietNow's philosophy and purpose. [Ryan v. Telemarketing, *supra*, 763 N.E.2d at 298.]

As the Illinois Supreme Court pointed out, there was no allegation in the complaint that VietNow had any complaints about either the money received from Telemarketers, or the services provided it under the terms of the contract. Ryan v. Telemarketing, *supra*, 763 N.E.2d at 291. This Court has ruled that the choice of the means of communication, whether on its own or through professional agents, is for the charity to make, not the State, and that this choice is constitutionally immune

from any State interest in whether that interest rests upon the premise:

> (1) that the charitable organizations are economically unable to negotiate fair or reasonable contracts without government assistance; or (2) that charities are incapable of deciding for themselves the most effective way to exercise their First Amendment rights. [Riley, *supra*, 487 U.S. at 790.]

Just because the Attorney General limited his complaint to Telemarketers, rather than VietNow, does not allow the Attorney General to regulate indirectly what he may not regulate directly. In Meyer v. Grant, 486 U.S. 414 (1988), this Court announced that "[t]he First Amendment protects [the] right not only to advocate [one's own] cause but also to select what [one] believe[s] to be the most effective means for doing so." *Id.*, 486 U.S. at 424. The choice of means includes the payment of compensation to a third party for "[i]t is well-settled that a speaker's rights are not lost merely because compensation is received." Riley, *supra*, 487 U.S. at 801.

By the filing of this complaint, then, the Attorney General has attempted to wrest from VietNow editorial control over its own charitable solicitations, as well as its interconnected "public awareness" and "good will" campaigns. Not only is this a violation of the freedom of speech, as recognized in Riley, it violates the freedom of the press as well. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court ruled that, no matter how strong and compelling its interest, the State may not "exercise [] editorial control and judgment" over a private publication (*id.*, 418 U.S. at 258), including its financial decisions which this Court found to be integral to the exercise of that control and judgment. *Id.*, 418 U.S. at 254-57.

By asserting that any funds in the State of Illinois for any charitable purpose are raised in trust for the "people of Illinois," and consequently that the fundraiser owes a fiduciary duty to the State, rather than to the charitable organization with which it contracted to raise the funds, the Attorney General has sought a remedy benefiting the State, rather than the charitable organization, or even the allegedly defrauded individual donors. Additionally, by his complaint, the Attorney General has sought — through requests for an accounting, injunctive relief, forfeiture of compensation and imposition of a constructive trust — a virtual take-over of Telemarketers' activities heretofore undertaken as agent for VietNow. The complaint and the relief sought constitute not only an usurpation of the speech and press rights of VietNow, but also a prior restraint upon any future solicitation/communication activities, which itself is a violation of the freedom of the press.[6] *See* Near v. Minnesota, 283 U.S. 697 (1931).

B. The Complaint Rests upon a Claim of State Power that Violates Freedom of Association.

By the filing of his complaint, the Attorney General has attempted to interpose the State not only between Telemarketers and their principal, VietNow, but also between VietNow and every individual resident in the State of Illinois. If the complaint is allowed to stand, the Attorney General would deny to VietNow and individual residents in Illinois their constitutionally-guaranteed right of association.

In FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985), this Court recognized that

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[6] The Illinois Supreme Court found an unconstitutional "chilling effect" upon speech even to allow this case to be tried because of the costs of litigation. Ryan v. Telemarketing, 763 N.E.2d at 299.

"direct mail solicitations" for money to support candidates for election to federal office was a form of association deserving full First Amendment protection, because such solicitation activity is a "mechinism [] by which large numbers of individuals of modest means can join together in organizations which serve to "amplify the voice of their adherents." *Id.*, 470 U.S. at 494. To deny full First Amendment protection to such activity, this Court observed, "would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.*, 470 U.S. at 495.

By the attempt in his complaint to isolate Telemarketers' charitable solicitation activity, on behalf of VietNow, from Telemarketers' communicative activity, on VietNow's behalf, the Attorney General has ignored the associational rights of VietNow and Illinois residents at stake in this case. Indeed, by his claims that Telemarketers have made fraudulent statements by omitting from their appeals the disclosure of the percentage of money that will actually be received by VietNow, the Attorney General has interposed the State between VietNow and the residents of Illinois in an unconstitutional manner.

First of all, the Attorney General's complaint would "mandat[e] speech" that VietNow has not authorized its agent to make, and thus, "necessarily alters the content of the speech." *See* Riley, *supra*, 487 U.S. at 795. Therefore, the complaint, if allowed to go forward, would constitute a "content-based regulation of speech." *Id.*

Such an interposition of State power constitutes administrative censorship, depriving VietNow of its constitutional right to have each householder contacted by Telemarketers to make the decision whether or not to support VietNow's efforts on behalf of Viet Nam veterans. *Cf.*

Schneider v. State, *supra*, 308 U.S. at 161-62. Under the First Amendment's guarantee of the right of association, the State may not "substitute[] the judgment of the community for the judgment of the individual householder." Martin v. City of Struthers, *supra*, 319 U.S. at 144 (1943).

Additionally, as this Court also recognized in Martin v. Struthers, "door-to-door distributors of literature may be ... a blind for criminal activities, [but] they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id.*, 319 U.S. at 145. To allow the Attorney General to go forward with this complaint, this Court would virtually close off VietNow's, and other comparable policy organizations', telemarketing campaigns, along with direct mail — the modern counterparts to door-to-door distribution — "so essential to the poorly financed causes of little people." *Id.*, 319 U.S. at 146; Riley, *supra*, 487 U.S. at 799. The Attorney General's tactic, like the regulatory scheme struck down in Riley, would most likely put professional fundraisers in the deep freeze in Illinois, and in doing so, exclude from the state vital information on a public policy issues, thereby abridging the privileges and immunities of the United States citizens residing in Illinois. Hague v. CIO, 307 U.S. 496, 512-14 (1939).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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